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It should be noted, that wholly apart from any question as to mitigation of damages, evidence as to provocation is always material in determining the extent of the actual injuries to the plaintiff's feelings. *Prentiss* v. *Shaw*, 56 Me. 427; *Parker* v. *Coture*, 63 Vt. 155. This is well recognized in the cases of libel and slander, where injury to the feelings causes the larger part of the compensatory damages. *B*—— v. *I*——, 22 Wis. 372. On the same principle, evidence of malice on the part of the defendant is admitted in aggravation of damages for injury to the feelings. *Hawes* v. *Knowles*, 114 Mass. 518.

THE NEW YORK FRANCHISE TAX. — In an anxiously awaited decision the New York Court of Appeals, reversing the judgment of the Appellate Division, has sustained the Special Franchise Tax Act, Laws of 1899, c. 712. *People, ex rel. Metropolitan St. Ry. Co.*, v. *State Board of Tax Commissioners*, 174 N. Y. —, (decided April 28, 1903). This statute authorizes the assessment of franchises to operate in "streets, highways, or public places," together with the tangible property used in such places, by the State Board of Tax Commissioners. The franchises and tangible property thus valued are to be subject, as realty, to the regular municipal, county, and state taxes. It was contended by the franchise owners that the assessment by a state board violated the "home rule" provision of the New York Constitution which directs that municipal officers for whose selection the Constitution does not otherwise provide shall be chosen by the electors of the municipality.

In the absence of an express constitutional guarantee of the right of local self-government, the cases are squarely in conflict upon the question of the existence of the right as an unwritten limitation upon the power of the legislature. The right was recognized in *People* v. *Hurlbut*, 24 Mich. 44; *contra*, *State* v. *Williams*, 68 Conn. 131. But whether the right depends upon express constitutional provision or not, its existence being once recognized, the cases are agreed as to its extent. See 1 DILL. MUN. CORP. 4th ed. § 58 a. The test of the state's power to control municipalities is, broadly speaking, whether the function in question is exercised by the city in its capacity as agent of the state, or in its capacity as agent of its own people, — whether, in short, the function is of general or of merely local interest. *Allison* v. *Welde*, 172 N. Y. 421; see 15 HARV. L. REV. 848. The application of the test, however, is not always easy.

The reasons assigned for considering the assessment of franchises a matter best dealt with by the state seem adequate. In the first place, in order to secure even an approximation to uniformity throughout the state in the assessment of property of such uncertain value, it is necessary that but one system should be employed. Again, since many companies operate in more than one municipality, state assessment avoids the evils of piecemeal valuation. And finally, control over structures in a highway would seem to follow from the recognized right of the legislature to control the highways themselves. *People* v. *Flagg*, 46 N. Y. 401. As to the tangible property in the highways, valuation can best be made only in connection with the franchises. The decision relied upon by the Appellate Division would seem not to control. *People* v. *Raymond*, 37 N. Y. 428. In that case a statute transferring all the functions of municipal tax commissioners to a state board was held unconstitutional. As some features of taxation are clearly of local importance only, that statute, in so far as it affected them, appears rightly to

have been placed on the other side of the line. In addition to being constitutional the Franchise Tax Law seems desirable politically, a quality rather rare in statutes against which the protection of the "home rule" principle has been invoked. See *The Ripper Cases*, 15 HARV. L. REV. 468. Previous to its enactment franchises in New York to the value of $200,000,000 had escaped taxation owing to the inexperience of the local assessors.

MASTER'S DUTY TO KEEP SAFE THE SERVANT'S WORKING PLACE. — It is well settled that a master is under a non-delegable duty to provide a safe working place for his employees. It is also well settled that he must by proper inspection and repair provide that the place shall not later become unsafe through natural causes. It is not so well settled that there is a similar duty where the subsequent unsafety is due to the acts of the servants themselves in the progress of their work. It is submitted, however, that this third case should be assimilated to the others, and a recent New York decision is authority for that view. Employees engaged under a foreman in excavating, undermined a mass of lime, rendering it unsafe. The plaintiff's decedent sent to work under it was killed. As it appeared that by a reasonably frequent inspection the master could have discovered the danger, he was held liable. *Simone* v. *Kirk*, 173 N. Y. 7.

In the first two classes mentioned above, if a master delegates to a servant the performance of his personal duty to provide and maintain a safe place for work, as has been seen, he is liable to his other employees for the servant's negligence in performing it. This liability does not arise from the doctrine of *respondeat superior*, for, if it did, the fellow servant rule would be a defense. It is rather a part of that public policy which gives rise to the personal duties themselves, — the necessity of protecting human life. It is clear that masters would avoid their personal responsibility, if, by delegating it, they could do so. The rule therefore results that there are certain duties securing safety with regard to the negligent performance of which by his servant a master cannot assert that his other employees have assumed the risk. The reason for the existence of this rule would demand its extension to the third class. The humane policy of protection would come to nothing, if the master, after originally providing a safe place, were allowed to permit the progress of the work to surround the servants with unnecessary dangers.

If the dangers are necessary, however, of course the master is not expected to remove them. This distinguishes the important cases where the master having discovered the danger, a servant is sent to remove it, and is injured. He is held to assume the risk. *Perry* v. *Rogers*, 157 N. Y. 251; *Murphy* v. *Boston & Albany*, 88 N. Y. 146. But though the master must remove unnecessary dangers, practical considerations, and many decided cases, show that he cannot be held to remove them at every moment of the work. See *Cullen* v. *Norton*, 126 N. Y. 1, 6. The idea therefore suggests itself that he should remove them from time to time. A non-delegable duty must be imposed on him to inspect and repair at certain fixed intervals. Such a conception explains most of the cases. Thus in all of the cases not already distinguished which were relied upon to negative the principal case, a sufficient interval had not elapsed since the place became dangerous. It is believed possible to suggest the following rule as consonant with the cases: the master is liable on the basis of his non-delegable duty to provide